

AL-MAJALLA AL AHKAM AL ADALIYYAH (The Ottoman Courts Manual (Hanafi))

BOOK IV. TRANSFER OF DEBT.

INTRODUCTION.

TERMS OF ISLAMIC JURISPRUDENCE RELATING TO TRANSFER OF DEBT.

- 673. By transfer of debt is meant transferring a debt from the account of one person to that of another.
- 674. The transferor is the debtor who makes the transfer.
- 675. The person in whose favour the debt is transferred is the creditor.
- 676. The transferee is the person who agrees the transfer of the debt to himself.
- 677. The subject matter of the transfer is the property transferred.
- 678. A restricted transfer of debt is a transfer of debt whereby the transferor limits the payment by the transferee to property of his owing by the transferee or in his possession.
- 679. An absolute transfer of debt is a transfer of debt whereby the transferor does not limit the payment to property of his in the possession of the transferee.

CHAPTER I. THE CONTRACT OF TRANSFER OF DEBT.

SECTION I. THE FUNDAMENTAL BASIS OF A TRANSFER OF DEBT.

- 680. A contract for the transfer of a debt is concluded by the transferor informing his creditor that he has transferred his debt to some other person, and by the agreement thereto of the creditor and such other person.
- 681. A contract for the transfer of a debt may be concluded between the person in whose favour the transfer is made and the transferee alone. Example:- A informs B that he has transferred to him a certain sum of money owing to him by C, and B agrees thereto; or A tells B to transfer to him a sum of money owing to him by C and B agrees thereto. In both cases a valid contract for the transfer of the debt has been concluded and the transferee may not thereafter go back on the transaction.
- 682. A contract for the transfer of a debt may validly be concluded between the transferor and the person in whose favour the transfer is made alone, provided the transferee, on being informed thereof, agrees thereto.

Example:- A transfers a debt which he owes B, to C, who is resident in some other country. B agrees thereto. If the transferee, on being informed thereof, agrees thereto, a valid contract for the transfer of the debt is concluded.

- 683. A contract for the transfer of a debt may be concluded between the transferor and the transferee only, subject to the agreement of the person in whose favour the transfer is made.

Example:- A transfers a debt owing to him by B to C. C agrees. The contract for the transfer of a debt has been concluded, subject to the consent of the person in whose favour the transfer has been made, and if the latter agrees thereto, such transfer becomes executory.

SECTION II. CONDITIONS RELATING TO TRANSFER OF DEBT.

- 684. To conclude a contract for the transfer of a debt, the transferor and the person in whose favour the transfer is made must be of sound mind, and the transferee must be of sound mind and have reached the age of puberty. Consequently, any transfer or acceptance of the transfer of a debt by a minor of imperfect understanding is void, and any acceptance of the transfer of a debt by a minor whether of perfect or imperfect understanding, or whether permitted by his tutor to undertake business, or whether interdicted, is void.
- 685. For the contract of transfer of debt to be executory, the transferor and the person in whose favour the transfer is made must have reached the age of puberty. Consequently, the transfer or acceptance of the transfer of a debt by a minor of perfect understanding is dependent upon ratification by the tutor. If the tutor ratifies, the contract becomes executory. Moreover, if the minor accepts the transfer of a debt and the tutor gives his permission, the transferee must be wealthier than the transferor.
- 686. It is not essential to the validity of a contract for the transfer of a debt that the transferee should be indebted to the transferor, nor that the transferor should be entitled to receive something from him.
- 687. A contract for the transfer of a debt in respect to which a valid contract of guarantee cannot be concluded, is invalid.
- 688. Any contract for the transfer of debt in respect to which a valid contract of guarantee can be concluded, is valid. The subject matter of the contract must, however, be clearly ascertained. Consequently, any contract for the transfer of a debt which is unknown is invalid.

Example:- A agrees to accept the transfer by B of some debt which may be proved in the future to be due to him. The contract is invalid.

- 689. A contract for the transfer of a debt incurred by reason of a guarantee or arising out of a contract for the transfer of a debt may be validly concluded, in the same way as a contract for the transfer of debts which have been incurred directly.

CHAPTER II. EFFECT OF A CONTRACT FOR THE TRANSFER OF DEBT.

- 690. The effect of a contract for the transfer of a debt is that the transferor, and his guarantor, if any, are liberated from all responsibility for the debt. The person in whose favour the contract is made then has the right of demanding payment thereof from the transferee. A pledgee who transfers his right to claim the debt from the pledge or to some third person loses all right of retention over the pledge.
- 691. If any person who makes an absolute transfer of a debt has no claim against the transferee, the latter may have recourse against the former, after he has paid his debt. If such person has a claim against the transferee, the amount of the claim is set off against the debt after payment has been made.
- 692. In the case of a restricted contract for the transfer of a debt, the transferor loses his right to claim on account of the subject matter of the transfer. The transferee is under no obligation whatsoever to give the subject matter of the transfer to the transferor. If he does so, he is liable to make good any loss resulting therefrom. Upon making good, such loss, he has a right of recourse against the transferor. If the transferor dies before making payment, his debts being greater than the value of his estate, the other creditors have no right to touch the subject matter of the transfer.
- 693. If a restricted contract for the transfer of a debt is concluded whereby payment is to be made from the sum to be received in respect to the price of a thing sold due to the vendor from the purchaser, and the thing sold is destroyed before the delivery, the price in consequence being no longer due, or if the thing sold is returned by virtue of a contractual option, or by reason of an option of inspection or an option for defect, or if the sale is rescinded, such transfer is not void and the transferee has a right of recourse against the transferor after payment. That is to say, he may obtain what he has given from the transferor. But if any person appears who is entitled to the thing sold and takes possession of the same whereby it is proved that the transferee is free from the debt, the contract of transfer is void.
- 694. If a restricted contract for the transfer of a debt is concluded whereby payment is to be made from a sum of money deposited on trust by the transferor with the transferee, and some person appears who is entitled to such money and takes possession of the same, the contract of transfer is void, and the debt reverts to the transferor.
- 695. If a restricted contract for the transfer of a debt is concluded whereby payment is to be made from a sum of money belonging to the transferor in the possession of the transferee, and such sum of money is not subject to compensation, the contract is void and the debt reverts to the transferor. If it is subject to compensation, however, the

contact continues in force.

Example:- A transfers to C a debt which is due to B, to be paid from money which he has deposited with C on trust, and such money is lost without any fault being attributable, before payment is made. The transfer is void and the sum due to the creditor reverts to the transferor. If such money has been wrongfully appropriated, or if, being deposited on trust, it has been lost by the act of C and must be repaid by him, the contract is not void.

- 696. If any person transfers a debt to some other person and provides that payment is to be made from the price realised on the sale of some specific property of his, and such person agrees to the transfer on that condition, the contract is valid, and the transferee is bound to sell the property and pay the debt from the price realised.
- 697. In the case of a vague transfer of debt, that is to say, in the case of a transfer of debt where it is not stipulated whether the subject matter of the transfer is payable forthwith, if the debt is likewise payable forthwith by the transferor. If the debt is payable at some future definite date, the transfer is of the same nature, and payment must be made when the debt falls due.
- 698. There is no right of recourse against the transferor until the transferee has paid the debt; and when recourse is made, the subject matter of the transfer may be claimed. That is to say, the transferee takes from the transferor exactly the same type of money that was the subject of the transfer. He cannot, however, claim the identical money which has been paid.

Examples:-

(1). Silver money is transferred. Payment is made in gold. Silver money may be claimed from the transferor and not gold.

(2). Payment is made with goods and effects. The money which was the subject of the transfer may be claimed.

- 699. If the subject matter of the transfer is paid, or it is transferred to some other person, or the person in whose favour the transfer is made liberates the transferee from the debt, or the person in whose favour the transfer is made makes a gift of the subject matter of the transfer or disposes of it as alms and the transferee accepts, he is liberated from the debt.
- 700. In the event of the death of the person in whose favour the transfer is made, and of the transferee becoming his heir, the transfer becomes devoid of effect.

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